Office-Supreme Court, U.S.
FILED
MAY 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK THOMPSON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

FRANK ASKIN
Counsel of Record
Constitutional Litigation Clinic,
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687

DANIEL POLLITT
University of North Carolina
School of Law
Chapel Hill, North Carolina 27514

NEIL RUTLEDGE
3636 16th Street, N.W.—B402
Washington, D.C. 20010

Attorneys for Petitioner

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

TABLE OF AUTHORITIES

Page

CASES:

Delaware v. Prouse,
440 U.S. 648, 663 (1979) 6

Hicks v. United States,
150 U.S. 442 14,15,17

Kolender v. Lawson,
51 U.S.L.W. 4532, 4533 (5/2/83) . 6

Oyler v. Boles,
368 U.S. 448 (1962) 4

Reagan v. United States,
157 U.S. 301 (1895) 15,16,17,18

United States v. Goodwin,
___ U.S. ___, 102 S. Ct. 2485
(1982) 2,3,5

United States v. Kelly, U.S.C.A., D.C. Cir.,
No. 82-1660, 5/10/83) 18,20

OTHER AUTHORITIES:

Note, Entrapment Through Unsuspecting
Middlemen, 95 Harv. L. Rev. 1122
(1982) 10

Gould, Milton S., "The Art of
Delation - Informers and
Abscam Lessons," New York Law
Journal, May 17, 1983 18,19

REPLY BRIEF IN SUPPORT
OF PETITION FOR CERTIORARI

1. Respondents' Brief in Oppcsition mis-states the fundamental issue posed by this case as whether there is a requirement of "probable cause" before the intrusive techniques of ABSCAM may be employed.* Petitioner Thompson has never contended that a "probable cause" standard must control, but only that a minimum threshold of "reasonable suspicion" is necessary before agents of the Executive Branch can lure a member of Congress before its secret cameras and seek to compromise him. Since Respondent concedes it had no "reasonable suspicion" as to Thompson, his conviction should be reversed. Similarly, contrary to Respondents' contention (p. 12), amicus American Civil Liberties Union only asserts

* This inaccurate statement of the issue is included in the Respondents' first Question Presented and in its Argument at pages 11-12.

that intrusive investigative techniques similar to those used in the ABSCAM investigation "cannot be used in the absence of facts or circumstances which reasonably indicate that they will detect criminal activity which is occurring or is likely to occur in the absence of the investigation" and "cannot be used against a specific target in the absence of particularized information linking the target to criminal activity."*

Having misstated the constitutional standard urged by Petitioner and Amicus, Respondent then attempts to equate this probable cause "strawman" with the "presumption of vindictiveness" standard rejected by this Court last term in United States v. Goodwin, ___ U.S. ___, 102 S. Ct. 2485 (1982) (involving discretion of

* Motion for Leave to File Brief Amicus Curiae in Support of Petitioner's Application for a Writ of Certiorari, at 7-8.

prosecutor to upgrade the charge after defendant withdrew a guilty plea). Under the false analogy drawn by Respondent, a so-called "probable cause" requirement would be equivalent to a presumption that executive branch agents have improperly targeted the defendant Congressmen. Instead, Respondent urges an approach, which it claims would appropriately follow Goodwin, requiring a demonstration of improper prosecutorial motive on a case by case basis rather than a prophylactic requirement of prior cause.

Respondent's analogy to the Goodwin situation is preposterous. Goodwin involved the propriety of a prosecutor's conduct toward an already arrested and charged criminal defendant. The issue before the courts was a typical post facto determination of the prosecutor's motivation in upgrading the charge in the context of a closely circumscribed factual history of a specific prosecution. All the facts of that

prosecution were known or easily available to the defendant who objected to the practice. The Court held it was inappropriate to create an evidentiary presumption to facilitate the fact-finding process. Cyler v. Boles, 368 U.S. 448 (1962), also cited by the Respondent, is to the same effect. It involved the exercise of discretion by a specific prosecutor as to whether to apply a recidivist provision to a specific defendant. In such a narrowly circumscribed field for the exercise of official discretion, the possibility of undetected abuse of that discretion is minimal.

The issue posed by the Thompson ABSCAM case, on the other hand, is the constitutional standard which is to govern when executive branch agents entice a suspicion-free member of the legislative branch before hidden cameras and attempt to incriminate him. The context is as far removed from

Goodwin as the decision to investigate is from the decision to charge -- and as removed as the political process is from the criminal-sentencing process. Moreover, the "sting" target's ability to prove prosecutorial motive is dramatically inferior to that of a defendant in an ongoing criminal case. Once indicted and arrested, a defendant is privy to the unfolding and highly structured pre-trial and trial process. The potential "sting" target, on the other hand, is completely unaware of who in the vast universe of government agents and informers is doing what to him and for what reasons and is unlikely to be able to retrace that history sometime in the future if the surreptitious executive branch activities result in actual prosecution. Still worse, the target whom the executive branch fails to corrupt (or charge with corruption) may never know in what ways his privacy was invaded and his integrity compromised -- or

may only find out when some embarrassing (although not incriminating) material gathered in the course of that investigation surfaces.

The correct measure of official discretion to lure legislators into compromising acts before secret cameras must be determined not by the need for an evidentiary presumption concerning prosecutorial motive, but by the need to protect the sanctity of the political/legislative process (see Petition, at 25-45) as well as the privacy of the individual by forbidding "unfettered governmental intrusion." Delaware v. Prouse, 440 U.S. 648, 663 (1979).

As this Court has again recently reminded us, "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty." Kolender v. Lawson, 51 U.S.L.W. 4532, 4533 (May 2, 1983). That framework requires minimal guidelines to govern law enforcement which prohibit police

and prosecutors from "pursuing their personal predilections." Id. at 4534. That framework cannot tolerate a discretion in police agencies to engage in ABSCAM-type "stings" against suspicion-free legislators restrained only by an accused's ability to prove impermissible motivation.

In a more cynical vein, the government's brief asserts that reversal of Petitioner's conviction would not further the intended goals because it would "be unlikely to deter" executive branch agents from conducting such investigations in the future, not for the purpose of instituting prosecutions, but for the purpose of collecting "information of lawful but embarrassing acts or statements by members of Congress." (At 16) Petitioner finds it difficult to believe that the Solicitor General seriously means to contend that the FBI and other federal law-enforcement agencies would defy a holding of this Court that such investigative

techniques violate the United States Constitution.*

2. In an effort to minimize the impact its proposed legal standard would have on our "framework of ordered liberty," Respondent carefully shades the facts of ABSCAM as they relate to Frank Thompson. This task is made easier by Respondent's decision to file a single brief covering all of the pending ABSCAM petitions in which it blurs the distinction among individual cases with blanket assertions, such as one from the District Court opinion (unsupported in the record as to Frank Thompson) that each of the defendants "was a willing volunteer seeking il-

---

* Petitioner finds incomprehensible the government's further statement that "the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct." (At 16) Petitioner has not questioned the right of the executive branch to investigate and prosecute members of Congress where there is "legitimate reason" to do so.

legal and corrupt payments." (At 19) Again treating all of the ABSCAM prosecutions as fungible, Respondent incorrectly claims that its agents only videotaped "meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it." (At 17) Whatever the record may show as to the advance knowledge and motivation of other defendants, the uncontradicted record in the Thompson case shows that he was enticed to meet with the phony Sheik's agents for the unquestionably legitimate Congressional purpose of bringing job-producing investments to his economically depressed district. As to Respondent's assertion (at 7) that Thompson had "agreed to cooperate" in advance of the October 9 meeting at the Georgetown townhouse, what the record in fact shows is (1) that

Criden had falsely told Weinberg prior to ever meeting Thompson that he had Thompson "all lined up" (see Petition at 6), and (2) that Thompson had, at the request of a constituent named Silvestri, agreed to a meeting, duly noted on his Congressional office calendar, "in regard to some Arabs in the United States loaning money to Americans." Id. at 5.

When Respondents' effort to tar all the defendants with the same brush comes into direct collision with Thompson's videotaped refusal of offered payments, it turns that

---

* Like Pontius Pilate, the government washes its hands of responsibility for dragging Frank Thompson into the ABSCAM net with the claim that "the government had no role whatsoever" in his selection. (At 15-16) Whatever may be the Court's ultimate determination as to government responsibility for the conduct of the unwitting agents unleashed by its own "creative activity," the issue is one with serious consequences for constitutional government and is one which warrants the plenary consideration of the Court. See Note, Entrapment Through Unsuspecting Middlemen, 95 Harv. L. Rev. 1122 (1982).

very distinction into evidence of Thompson's "crafty behavior," which Respondent offers as further evidence "that such schemes are not uncommon."*

3. The distorted portrayal of the facts as they relate to Frank Thompson (Point 2, supra) helps Respondent to obfuscate the significance of Petitioner's Brady claim. It must be remembered that the only adverse testimony against Thompson, to offset his videotaped rejection of payments, came from Ellis Cook, an immunized witness who could offer only hearsay testimony of what his mentor Howard Criden told him of his alleged

* This purportedly widespread legislative corruption, coupled with the alleged difficulty of uncovering it, is then used as justification for the claim of extraordinary investigative authority to ferret it out. (At 19) As to the claimed difficulty of prosecuting congressional corruption, Petitioner set forth in his Reply Brief in the Court of Appeals 40 instances, since 1943, in which members of Congress had been prosecuted for various acts of actual corruption without the aid of "sting" operations. (Reply Brief for Appellant Frank Thompson, Jr., at 5-13).

arrangement with Thompson, and Congressman John Murtha. Despite specific demands from defense counsel for any information "suggesting any promises or indications of immunity, leniency, decisions not to prosecute or favorable treatment to ... John Murtha," the prosecution made no pretrial disclosures. On cross-examination, Murtha repeatedly denied any "deals." When, at the close of trial, the prosecutor was willing only to stipulate that the government has "no present intention of prosecuting Congressman Murtha," Thompson's counsel took what he could get and told the court that the stipulation was "fully acceptable on behalf of Mr. Thompson."

Contrary to Respondent's brief, the story does not end there. Deputy Assistant Attorney General Irvin Nathan, who had been in the Courtroom during the aforementioned colloquy, testified at the post trial due process hearings that "a decision was made

not to indict Congressman Murtha" at the same time "a decision was made to indict Congressmen Thompson and Murphy." Nathan "participated in that decision-making process." (DP Tr. at 608) This decision was communicated both to Murtha's counsel, and to the House Ethics Committee. Nathan was aware that Murtha was a member of the House Ethics Committee. For the government to maintain at this late date that "no immunity /was/ granted to Congressman Murtha" (at 26), borders on the irresponsible, a transparent effort to avoid the deserved consequences of Brady.

4. In defending the court's instruction as to Frank Thompson's credibility as a witness -- an obviously important concern in light of the 3 days of jury deliberations -- Respondent implies that Petitioner objects to a "single instruction ... judged in artificial isolation" which was "immediately balanced" by other statements. (At 31)

This is simply not the case, as a review of the Petition will clearly demonstrate. The court's progressively harsher language in reference to Thompson's "motive to lie" contrasted sharply with the charge as to other witnesses.

Respondent's brief further suggests that the Petition may have manipulated the case law. This is manifestly incorrect.

Petitioner relied on Hicks v. United States, 150 U.S. 442. There the trial judge charged the jury that it must consider the defendant's interest in the case, which might cause him to make statements "that would not be governed by the truth," that the defendant "might be led away from the truth" because of his interest in the case. 150 U.S. at 451. This Court held that this charge was reversible error. In a fanciful reading of Hicks, Respondent says that the Hicks Court "strongly suggested that an instruction pointing out that a defendant

who testified had a motive to lie would not be sufficient to warrant the reversal of a conviction." (At 31) The Court in Hicks said no such thing. Rather, it said:

> It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person.
>
> 150 U.S. at 452

This suggestion was immediately qualified by the following warning, quoted in the Petition (at 60) that the right of an accused to testify in his own behalf

> would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability.
>
> Id. at 452

Our petition then discussed Reagan v.

United States, 157 U.S. 301 (1895). There the judge charged the jury as a general proposition that it "should look at the interest which the respective witnesses have in the suit or in its result" because where the witness has a direct personal interest, "the temptation is strong to color, pervert, or withhold the facts." Then becoming specific, the Judge charged:

> The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.
>
> 157 U.S. at 304

The Court held that this charge was not reversible error, because: "There is no declaration or intimation that the defendant has been untruthful in his testimony." 157 U.S. at 311. The Court contrasted the

situation in Hicks, where "an instruction as to the effect of a conflict between the testimony of defendant and other witnesses was condenmed, because of the assumption in it that the other witnesses were 'telling' the truth." 157 U.S. at 309.

Here, as in Hicks, we have an instruction or intimation that the defendant (Thompson) "has been untruthful in his testimony." Here, as in Hicks, we have an instruction that assumes "the other witnesses were 'telling the truth.'"* Here, as held in Hicks and emphasized in Reagan, the trial court cannot charge "directly or indirectly" that the "defendant is to be disbelieved because he is a defendant," for "that would practically take away the benefit which the law grants when it gives him the privilege

* As to "accomplices, informers and immunized witnesses," the jury was told the government must "take the witnesses to a transaction as they are" and merely cautioned this jury "to be careful in reviewing that testimony and weigh it with care."

of being a witness." Reagan v. United States, supra, 157 U.S. at 310.

5. Since submission of the Petition for Certiorari, the Court of Appeals for the District of Columbia has decided yet another ABSCAM case, United States v. Kelly, No. 82-1660, decided May 10, 1983. Although unanimously reinstating the conviction of Congressman Kelly, the two concurring opinions mirror the sharp division within the federal judiciary over the ABSCAM techniques.

Judge MacKinnon was alone when he wrote in Part III(B) of his opinion that "ABSCAM was not significantly different from an undercover drug or fencing operation offering to buy from all who appear at its door,"*

* The most compelling response to Judge MacKinnon's assertion appears in a provocative analysis of ABSCAM by a prominent New York attorney, Milton S. Gould, in May 17, 1983 New York Law Journal:

> Unlike the war on the drug traffic, projects like ABSCAM derive from no cognizable social needs: they arise out of the imagination and amibition of govern-

and he was alone in Part III(C) when he rejected the defendant's specific claims of "outrageous" government conduct.

Neither Judge Ginsburg nor Judge Robinson concurred with Judge MacKinnon's conclusions. Rather, they shared the District Court's "grave concern" that the ABSCAM drama unfolded as an "unwholesome spectacle." (Slip opinion of Judge Ginsburg at 7). The Majority of the panel concurred in the per curiam judgment because:

> Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.
>
> Id. at 5

Thus, in effect, the majority members of the

Footnote continued

> employees, civil servants, who can command the services of informers out of a casting reservoir provided by the penitentiaries. (Gould, "The Art of Delation - Informers and Abscam Lessons.")

Kelly panel seemed to be associating themselves with Petitioner in urging this Court to provide that elaboration and thereby give guidance to those who must administer and apply the law and to those on the bench who, above all, must guard us from our guardians.

Respectfully submitted,

Frank Askin
Constitutional Litigation
Clinic, Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
201/648-5687
Counsel of Record

Daniel Pollitt
University of North Carolina
School of Law
Chapel Hill, North Carolina
27514

Neil Rutledge
3636 16th St., NW - B402
Washington, D.C. 20010

Attorneys for Petitioner

May 23, 1983